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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER and
AUTRICE COPELAND FREEMAN, *Petitioners,*

v.

STEWART L. UDALL, Secretary of the Interior, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ARIZONA, URGING THAT THE WRIT OF CERTIORARI ISSUE.

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QUESTIONS PRESENTED

1. Whether any rights accrue to an applicant to purchase land under Sections 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c.865, 48 Stat. 1272, and Act of June 28, 1934, c.865, 48 Stat. 1274, now appearing as 43 USC. 315(f) and 43 USC. 1171) prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification, of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, c.324, 60 Stat. 243, which now appears as 5 USC. 1009).

INTEREST OF AMICUS CURIAE

The United States Court of Appeals for the Ninth Circuit, in Ferry vs. Udall, the decision here appealed from, answered the first question as presented by this amicus curiae in the negative, and the second in the affirmative. This amicus curiae feels that said honorable court erred.

This decision has a far reaching effect upon the whole Taylor Grazing Act, and possibly other land disposal laws recently enacted.

The case dealt specifically with Section 14 of the Act, however, said section can only be implemented by use of Section 7 of the Act, a fact which was not discussed by the Ninth Circuit.

If the activities of the Secretary, pursuant to Section 7, are, in all instances within his complete and unreviewable discretion, with no right accruing to the applicant until the issuance of cash certificate, then the State of Arizona is in the same position with regard to exchanges under Section 8 (c) of The Taylor Grazing Act, 43 USC.315 (g), since the authority to receive and process an application is governed by Section 7 of said Act.

Recent legisation has been enacted to provide temporary authority for the sale of certain public lan[illegible] (Act of September 19, 1964, 78 Stat. 988, and 78 Stat. 989) to political subdivisions and others and to allow regulations to be promulgated by the Secretary to implement such disposals (Act of September 19, 1964, 78 Stat. 986).

The Ninth Circuit's decision in this case, and the decision in *Willcoxson* vs. *United States*, 313 Fed. 2d, 884, have already affected the Secretary, as may be seen in new regulations set up by the Secretary.[1]

[1]These new regulations, pursuant to the recent legislation, as none before, indicate the absolute arbitrary authority which the Secretary feels he has, under land disposal statutes. 43 CFR, part 2240, dealing with sales and exchanges, sub-part 2243 dealing with public sales, states as follows: "Section 2243.2-5 Sales through competitive bidding: Time, place, simultaneous bids. If classified lands are offered to competitive bidding: . . . (e) the acceptance of an offer to purchase will be by the issuance of a final certificate to the bidder. Until the final certificate is issued, the authorized

In other words, the effect of these decisions is to create uncertainty of acquisition, no matter what the applicant has done, until cash certificate or patent is issued. Throughout all the proceedings, which may be quite time consuming due to administrative processing, the Secretary may, for any reason, change his mind, and his reasons are not even subject to review.[2]

It is our contention that such power by the Secretary negates the basic purpose of The Taylor Grazing Act in requiring the Secretary, among other things, to dispose of unused Federal land, properly classified, to the states and the citizens thereof.[3]

One question involved here is whether or not there is any discretion of the Secretary left after classification of the land as suitable for sale and public auction or application for exchange thereof, and acceptance of the land offered in exchange. But even if said discretion exists, the decision of the Ninth Circuit stating

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officer has the right at any time to determine that the land should not be sold or that any and all bids should be rejected. *Generally*, if the high bid is not less than the fair market value of the land on the date for receiving bids, as specified in the public notice issued pursuant to Section 2243.2-4 (b), any appreciation or depreciation thereafter in value of the lands will *not necessarily* be a basis for a determination that the land will not be sold . . . ." (Emphasis supplied). As can be seen, this regulation goes much farther than 43 CFR.250.5 which is at issue in this case. This regulation, in effect, makes disposition absolutely discretionary with the Secretary of the Interior even though the statute states: ". . . The Secretary of the Interior is authorized *and directed* to dispose of public lands that have been classified for disposal . . . ." (Emphasis supplied) 78 Stat. 988 and 78 Stat. 989.

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[2]This is shown by the fact that in the Ferry-Baker case, as in the Freeman case, almost three years elapsed between the time of sale and the refusal of sale for reasons not in existence at the time of the sale.

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[3]"There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program." U.S. Code Congressional Service, 80th Congress, First Session, 1946, page 1510.

that said discretion is not reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, C.324, 60 Stat. 243, 5 USC Sec. 1009) has the effect of destorying any certainty of orderly processing of applications for sale or exchanges of property under The Taylor Grazing Act. In this regard, the various states' interest is as vitally affected under Section 8 (c) of The Taylor Grazing Act as that of a private applicant's for a cash sale under Sections 7 and 14 of said Act.

The State of Arizona contains 72,688,000 acres of land.[4]

Of this land, 15.58% is privately owned, 12.76% is state owned, and 71.66% is owned, controlled or held in trust by the Federal government.[5] Even if Federal land used for such purposes as national forests, parks, Indian reservations, military uses, etc., is excluded, there is more unused Federal land in the state of Arizona than privately owned land.[6] This land is not being developed. It pays no taxes to the state. It is, without further development by private capital, a burden to all concerned.

Therefore, the state of Arizona, and many other western states, are effectively land-locked unless there is orderly disposal of unused Federal land to those states and the citizens of those states.

And what has been the effect of giving the Secretary unbridled discretion? The result can be clearly seen by looking at the Bureau of Land Management's own statistics concerning patents issued and land sold under Section 14 of The Taylor Grazing Act from the years 1958 to 1963:[7]

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[4]1963 Public Lands Statistics, U.S. Dept. of the Interior, Table 1, Page 3.

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[5]1963 Public Lands Statistics, U.S. Dept. of the Interior, Table 7, Page 12; Arizona Statistical Review, 20th Annual Edition, September 1964, Research Department, Valley National Bank, Page 36.

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[6]Ibid.

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[7]1963 Public Lands Statistics U.S. Dept. of the Interior, Table 17.

Fiscal Year	Patents Issued	Acreage
1958	60	15,378.67
1959	95	15,939.11
1960	59	10,107.96
1961	4	535.06
1962	2	715.69
1963	9	1,360

The Taylor Grazing Act exchanges in Arizona under Section 8 of the Act, which are subject to classification and processing under Section 7 of the Act, from 1958 to 1963, are as follows:[8]

Fiscal Year	Total Exchanges	Selected Acreage
1958	15	5,896.55
1959	20	27,791.45
1960	8	55,053.11
1961	0	0
1962	1	3,441.66
1963	2	1,280

The vacant public domain lands in Arizona under the exclusive jurisdiction of the Bureau of Land Management at the end of the fiscal year 1959 were 12,452,888 acres. At the end of the fiscal year 1963, the figure was 12,401,877 acres.[9] This represents a total reduction of vacant public domain in Arizona, said lands being transferred to state or private ownership, of 51,011 acres, or less than one-half of 1% over a five year period, or less than one-tenth of 1% per year. At this rate, it would take the Bureau of Land Management 1,215 years to dispose of all the public domain lands in Arizona. Thus, the interest of the state

[8]Public Lands Statistics, U.S. Dept. of the Interior, Table 25.

[9]Public Lands Statistics, U.S. Dept. of the Interior, Table 11.

can clearly be seen. The unbridled discretion of the Secretary of the Interior under The Taylor Grazing Act has not only thwarted state exchanges, it has thwarted private exchanges and cash sales at private auction, all to the detriment of the economy of this state.

ARGUMENT

The appellants in this cause have stated good reasons for granting the Writ of Certiorari in this case, and said reasons are hereby supported by this Amicus Curiae.

Further, the statement of this Amicus Curiae's interest in this matter shows the importance of the determination of this cause by this court. The Circuit Court was wrong in determining the two questions presented by this Amicus Curiae as it did. The determination of these questions has far reaching effects upon the land disposal laws of the United States, and the power of the Secretary of the Interior and his department.

I. FAILURE TO RECOGNIZE RIGHTS WHICH APPLICANTS HAVE UNDER SECTIONS 7 AND 14 OF THE TAYLOR GRAZING ACT, AND REGULATIONS PURSUANT THERETO.

(a) Rights Under the Act.

If the Court properly examines the statutes involved, it will find that the sale of public lands under the Isolated Tracts Act, Revised Statutes, Sec. 2455 as amended; 43 USC.1171, is controlled by The Taylor Grazing Act, because the Isolated Tracts Act is Sec. 14 of The Taylor Grazing Act (43 USC. 1171).

In order to even make application for a sale of public domain lands, use has to be made of Section 7 of The Taylor Grazing Act, as well as the said Section 14 thereof, Section 7 being the so-called "Classification Section" of The Taylor Grazing Act. The enacting clause of Section 1 of The Taylor Grazing Act is both mandatory and discretionary. In it, Congress directs the Secretary to stop injury to the public grazing lands etc., and "in order to pro-

mote the highest use to the public grazing lands pending its final disposal, the Secretary of the Interior is authorized in his discretion to establish grazing districts". This he did. And in order to get any of the lands out for any disposal, one has to look to the classification authority and process under Section 7 of this Act, which is to say, 43 USC. 315 (f). Section 7 of The Taylor Grazing Act, as it stood at the time of filing of the application for the subject disposal of public lands in this case, said:

> "Section 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify lands withdrawn or reserved . . . or within a grazing district . . . Provided, that upon the application of any applicant qualified to make entry, selection, or location, under the Public Land Laws, filed in the Land Office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if open to entry as herein provided." (43 USC. 315 (f)).

This section must be used in all applications filed under the Public Land Laws, including the so-called Isolated Tracts Act.

The receiving of applications under the above quoted proviso of the said Section 7 and the classification of lands thereunder, are both clearly mandatory. The Secretary may also, in his discretion, classify for disposal without any citizen making application therefor.

The language used in Section 7 requires some explanation. It states that an applicant qualified to make entry, selection or location under the Public Land Laws, who makes any such application, *shall* cause the land applied for to be classified and if the application is allowed by the Secretary, it *shall* entitle the applicant for a preference right to enter, select or locate such lands, if open entry is herein provided.

According to the Glossary of Public Land Terms, 1949, USDI, BLM, Page 3, an applicant is: "an individual, corporation, state or local government, etc., applying for rights or title to, public

lands or resources . . .". An application is "a formal request for rights in, or eventual title to, public lands or resources." An entry is "in general, an allowed application which was submitted by an applicant who will acquire title to the land by payment of cash or its equivalent and/or by entering upon and improving the land." In like way, a "selection" deals with an applicant who seeks to exchange property with the Federal government.

Therefore, as can be plainly seen, the Secretary's decision in these matters is not committed wholly to his discretion. Once the proper person has made an application, said applicant has, "a preference right to enter, select, or locate such lands if open to entry as herein provided." (43 USC. 315 (f)).

This right under Section 7 of The Taylor Grazing Act, is not to be confused with the preference right given to adjoining land owners under Section 14 of The Taylor Grazing Act. (43 USC. 1171)

Therefore, under Section 7 of The Taylor Grazing Act, there exists the right of a qualified applicant to make an entry or selection under the Public Land Laws of which Section 14 of The Taylor Grazing Act, the so-called Isolated Tracts Act is one. In addition, there exists the right that the application will be considered to the extent that the selected lands will be looked at and "classified", this right being specifically mandatory as set forth in said Section 7 of The Taylor Grazing Act.

The Secretary has discretion, acting through his authorized officer, to reject or approve the application.

If the citizen's application to enter or select a certain isolated tract is approved, it is then lawful for the Secretary to order disposal of the selected lands which is done under Section 14, by auction.

These rights exist under the statutes.

(b) *Rights Under the Regulations.*

Once the auction on the land has been held, do any rights accrue

to the applicant who is the high bidder?

It is the Secretary's position that no rights accrue. The lower court relied heavily upon 43 CFR,250.5.[10] The Ninth Circuit found in this case, that by reason of this regulation, the discretion of the Secretary as to whether or not to sell, was completely unreviewable until a cash certificate was issued.

If this regulation is read in conjunction with the other regulations, this can clearly not be the proper interpretation. It is true that 43 CFR. 250.5 says "the authorized officer may, at any time, determine that the land should not be sold" prior to the issuance of a cash certificate. The question remains: On what basis may he make such determination? A reading of this regulation in conjunction with the other regulations leads to the inescapable conclusion that there are only certain things upon which this determination can be based, otherwise the other regulations are unnecessary and of no force and effect.

A subsequent regulation, 43 CFR. 250.11, which is headed "Action at Close of Bidding" states in part as follows:

(a) Declaration of Highest Bidder.

"When all persons present shall have ceased bidding, the manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchase of owners of contiguous land (see paragraph (b) of this Section), announce the amount of the highest bid and declare the offeror thereof (or his principal) the highest bidder, provided that the latter immediately pays to the manager the amount of the bid, if he has not already done so . . ."

The Section goes on to set forth the right of adjoining land owners as to their preference right, and ends by saying as follows:

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[10]"Section 250.5. Effective Application. The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from any other application under the Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

"(4) If, by the end of the preference right period, no preference right has been asserted, the sale will be declared closed and the manager may declare the highest bidder the *purchaser.*" (Emphasis supplied).

By the Secretary's own regulations we now have a purchaser of the lands offered for sale. On what basis now may the authorized officer 'determine" that the lands should not be sold, pursuant to 43 CFR. 250.5?

It is appellant's contention and quite properly so, that the only basis for such a determination not to sell, must be for the failure of the conditions to be performed under 43 CFR. 250.12 which sets forth certain conditions to be performed by the successful bidder, including the reimbursement of publication costs and the filing of proof of such payment with the Land Office. Also, the successful bidder must file with the manager, a statement of his citizenship and, after performing these conditions subsequently, the regulation goes on to state:

"(c) When there has been full compliance with the regulations in this part, the manager *will* issue a cash certificate to the purchaser." (Emphasis supplied).

It may be that 250.5 is correct when it states that until a cash certificate, there is no contractual right against the United States, but there is clearly the right to have a cash certificate issued. And if there is a right to have a cash certificate issued, it follows that this right cannot be interfered with by the unbridled discretion of the Secretary.

It is acknowledged that the Secretary has the discretion to determine what land should be classified as suitable for disposal, and whether or not to accept an application, but it is contended that thereafter, this discretion ends and does not carry over to the ordinary mechanical procedure of selling the land.

II. REVIEW OF THE SECRETARY'S DECISION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Even if such discretion does carry over to the mechanical sale

or exchange of the property involved, after the application has been approved, is this discretion to such a nature that it cannot be reviewed under the Administrative Procedure Act?

On page 8(a) of its decision, the lower court held:

> "Since Section 10 of the Administrative Procedure Act prohibits judicial review of agency action". . . by law committed to agency discretion. . .', we are without power to review the Secretary's decision in this case."

Section 10(e) of the Administrative Procedure Act goes on to say in part:

> "Scope of Review — So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; . . . ."

As has been pointed out by one commentator, subsection (e) read together with the introductory clause produces this queer result: "Except so far as . . . agency action is by law committed to agency discretion . . . the reviewing court shall . . . set aside agency action . . . found to . . . an abuse of discretion.[11]

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[11]Davis, Administrative Law, 1951 Edition, Page 842

The courts are exceedingly slow to rule that a statute precludes all judicial review.[12] Preclusion of judicial review of administrative action is not likely to be inferred.[13] The legislative intent to forbid judicial review must be clear and convincing and unmistakable.[14]

This amicus curiae does not deny the fact that classification of land suitable for disposition under Section 7 of The Taylor Grazing Act is so committed to the Secretary's discretion that it is not subject to being reviewed by this Court. Such classification necessarily involves nice questions that require complete discretion, however, to say that this discretion carries over to mechanical procedure after a sale is once instituted would appear to violate the purpose of the Administrative Procedure Act.

Certainly, no nice questions are involved as to whether or not the Secretary followed proper procedure in the mechanical processing of the sale. To so hold is to say that the Secretary has

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[12]*Guardian Life Insurance Company* v. *Bohlinger*, 308 NY.174, 124 NE2d, 110, reh den 308 NY.810, 125 NE2d, 867.

Air Line Dispatchers Assoc. v. *National Mediation Board*, 89 App. DC.24, 189 F2d. 685, cert. den. 342 US.849, 96 L. Ed. 641, 72 S.Ct.77.

See *Heikkila* v. *Barber*, 345 U.S. 229, 97 L. Ed. 972, 73 S.Ct. 603, reh. den. 345 U.S. 746, 97 L. Ed. 1371, 73 S.Ct. 828, quoting the House Report requiring the statute "upon its face" to give clear and convincing evidence.

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[13]*Estep* v. *United States*, 327 U.S.114, 90 L.Ed. 567, 66 S.Ct. 423.

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[14]"To preclude judicial review under this bill, a statute if not specific in withholding review, must upon its face give clear and convincing evidence of an intent to withhold it." Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946). Also, an exchange on the Senate floor at the time the Administrative Procedure Act was under debate, went as follows:

"Mr. Donnell: 'But the mere fact that statute may vest discretion in an agency is not intended by this bill to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?'

"Mr. McCarran: 'It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.'

"Mr. Donnell: 'I thank the Senator.' "

Senate Document 248, 79th Congress, 2nd Session, 212 at 311.

unlimited discretion to determine who the buyer is, and that this discretion is unreviewable.

The language used in *Willcoxson* v. *United States,* 313 Fed.2d, 884, is unfortunate. In that case, it developed after the sale that said public land was prospectively valuable for uranium, which, under one of the existing Acts of Congress, could not be bought nor sold under penalty of that Act.

CONCLUSION

The decision of the lower court has far-reaching effect upon the future economy of the State of Arizona, and all western states.

There are presently pending in the Federal Courts, approximately as many as twenty cases against the Secretary, the Director, and the various land Office manager, involving land disposal under The Taylor Grazing Act.[15] This figure includes as many as five land script cases rather than public auction sales or exchanges, however, these are included because they all involve the classification of the selected land under Section 7 of The Taylor Grazing Act in a like manner as entries for public auction sales or exchanges.[16] It should be pointed out that most of these appeals have arisen after from two to five years consumed in exhausting administrative remedies. Most of the citizen applicants are exhausted financially and do not feel that they can afford the expense of appealing to the courts after this period of time. A better index of the situation is the fact that during the fiscal year of

[15]Mr. Ernest Hohm of the United States Solicitor General's office, via long distance telephone call of April 16, 1965.

[16]The Taylor Grazing Act of June 28, 1934 (48 Stat.1269, 43 USC.314) authorized the Secretary of the Interior to classify land withdrawn or reserved by Executive Order of November 26, 1934 and February 5, 1935, all within grazing districts which are more suitable for any purpose other than the production of native grasses or forage plants, or which are proper for acquisition in satisfaction of any outstanding lieu, exchange, or scrip right, or land grant, or which would be proper to expose for public sale and to open such lands to entry, selection or location in accordance with such classification.

1963, the Director of the Bureau of Land Management had before him for consideration, a total of 160 appeals on public auction sales and 18 appeals on exchanges. This does not include 139 homestead applications and 485 desert land applications, which are also classified under Section 7 of The Taylor Grazing Act.[17]

A determination of this court that the acts of the Secretary are subject to judicial review would encourage him to provide more uniform application of his rules and to deny applications only for just cause and would help to prevent this type of litigation.

The number of appeals pending shows that the appellant's statement as to chaos in this administrative field is correct. No one, including the states which seek to have their lieu selections and exchange rights satisfied under the existing Public Land Laws can ever be certain of their rights and interests before the Department of the Interior. These rights have definitely been placed in jeopardy by the decisions below.

For these reasons, the Writ of Certiorari in this matter should be issued.

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[17]1963 Public Land Statistics, USDI, BLM, Table 54.

Respectfully submitted,

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